



Defamation in Scots Law: A Consultation

RESPONDENT INFORMATION FORM

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Are you responding as an individual or an organisation?

Individual

Organisation

Full name or organisation's name

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The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

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The option 'Publish response only (without name)' is available for individual respondents only. If this option is selected, the organisation name will still be published.

If you choose the option 'Do not publish response', your organisation name may still be listed as having responded to the consultation in, for example, the analysis report.

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again

in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Yes

No

List of consultation questions

Question 1

Do you agree with the analysis contained in the Commission's Business and Regulatory Impact Assessment (BRIA)? If not, please explain your reasons for disagreement.

Yes
 No

Please explain your answer.

Broadly, we agree that Defamation laws in Scotland urgently need to be reformed. As investigative journalists, who are members of a co-operative body owned by more than 1000 reader and writers largely based in Scotland, our purpose is holding power to account in the public interest. Experience has taught us that the law of defamation can be a powerful tool in the hands of powerful people, to keep information of wrongdoing out of the public eye. We also agree with the broad thrust of the BRIA. We set out where we differ below.

Question 2

Do you consider defamation should be defined in statute?

Yes
 No

Please explain your answer.

The current law is outdated and fails to reflect the reality of modern publishing. As a digital publisher based in Scotland there are aspects of the current law that are unduly restrictive and hinder legitimate public interest reporting and freedom of speech.

Question 3

Should a statutory threshold test of serious harm like section 1(1) of the Defamation Act 2013 be introduced?

Yes

No

Please explain your answer.

The current threshold can mean that statements that embarrass or cause discomfort can be held to be the basis for an action. This is far too low, restricts freedom of speech and leads to self-censorship or prior-restraint among publishers, particularly small publishers, where the costs of defending an action can have a significant impact on business viability, even if they were to defend themselves successfully. A statutory serious harm test is therefore vital. In addition, where publishers are regulated by a regulator recognised by the Press Recognition Panel, then there should be an additional test to ensure that those raising defamation actions have first pursued the complaint via the independent arbitration process offered by these publishers.

Question 4

If a statutory test is adopted, should we define what constitutes 'serious harm'?

Yes

No

Please explain your answer.

Do you have any suggestions about what should constitute 'serious harm'?

Question 6

Legal persons which have as its primary purpose trading for profit may have a reputation that they wish to protect. Do you agree that such bodies should be able to raise actions in defamation?

Yes

No

Please explain your answer.

Incorporated bodies that trade for profit cannot feel "psychological distress." Large corporations may use the considerable resources at their disposal to raise defamation actions, or the threat of defamation actions, to attempt to stifle legitimate public interest criticism. We would therefore strongly support legal restrictions on corporate for-profit bodies using defamation laws.

Question 7

Damage to the reputation of such legal persons may not take the form of financial loss. If the Scottish Government were to take forward (and the Scottish Parliament agreed to) the Commission's recommendation that such bodies are allowed to continue to raise proceedings in defamation, do you agree that these types of legal persons should face a threshold test of showing that serious harm to their reputation has caused (or is likely to cause) financial loss?

Yes
 No

Please explain your answer.

If these bodies are permitted to continue to raise proceedings in defamation law they should be subject to a serious harm threshold test. In addition, where publishers are regulated by a regulator recognised by the Press Recognition Panel, then there should be an additional test to ensure that those raising defamation actions have first pursued the complaint via the independent arbitration process offered by these publishers.

Question 8

If legal persons were allowed to continue to raise proceedings in defamation subject to a threshold test, should this be further limited to allow only micro enterprises to continue to raise proceedings?

Yes
 No

Please explain your answer.

Whilst we favour restrictions on all for-profit bodies, it is reasonable to assume that "micro-enterprises" would be less likely to raise or threaten spurious or defensive defamation actions. Again, were this clause to be introduced we would wish to see an additional test affecting publishers that are regulated by a regulator recognised by the Press Recognition Panel. Those raising defamation actions should have first pursued the complaint via the independent arbitration process offered by these publishers.

Question 9

While the intention to state the Derbyshire principle in statute was widely welcomed, a number of responses questioned the definition of ‘public authority’ used in the Commission’s draft Bill, with some uncertainty about whether a charity or even a doctor could be caught by the definition. Is there anything captured by the definition that is not by the Derbyshire principle?

Question 10

Conversely, is there anything not captured by the definition that is caught by the Derbyshire principle?

Question 11

Should the Derbyshire principle be recast so that private companies delivering public functions are not able to raise an action in defamation?

Yes
 No

Please explain your answer.

Private companies are increasingly responsible for delivering public services throughout the UK. Where private companies are responsible for spending and managing services using tax-payer cash there is clearly a case for far greater public interest and scrutiny of their activities. They should therefore be exempt from raising defamation actions on the same basis that public bodies are.

Question 12

Public authorities are barred from raising proceedings in defamation under the Derbyshire principle, but are able to fund proceedings brought by an individual in their employment. Do you agree that public authorities should continue to be able to meet the expense of defamation proceedings in this situation?

Yes
 No

Please explain your answer.

This allowance simply serves to undermine the Derbyshire principle.

Question 13

Do you agree that a new action of unjustified threats is necessary over and above the recommendations made by the Commission in their Report?

Yes

No

Please explain your answer.

Yes, it is vital that those pursuing a spurious or unjustified claim understand that there are likely to be consequences to undertaking this course of action. The Ferret has already been forced to withhold publication of at least one public interest story simply due to the threat of litigation. We did not have the resources to defend against the threatened action, and even though in that instance we were confident of our case, it would still be too expensive to publish this story even if we were successful in our defence and subsequently awarded costs. Again, were this clause to be introduced we would wish to see an additional test affecting publishers that are regulated by a regulator recognised by the Press Recognition Panel. Those raising defamation actions should have first pursued the complaint via the independent arbitration process offered by these publishers.

Question 14

Do you agree that the definitions of author, editor and publisher in section 3 of the draft Bill contained in the Commission's Report will remove liability for secondary publishers?

Yes

No

Please explain your answer.

No. The proposed definition of "editor" is ambiguous and open to a more expansive interpretation in a manner that could threaten secondary publishers. This could undermine the stated intentions of this reform. There is a substantial risk that pursuers will argue that individual social media users are effectively the "editors" of the content they may publish on online platforms, and consequently, remain liable in defamation proceedings. Without a narrow enough definition, editor could be interpreted to include secondary publishers, such as people who retweet, copy, bookmark or share content, alongside website operators, hosting companies and social media group moderators.

This is a significant risk to The Ferret as a small digital publisher – as we may be required to moderate all comments on our website, and on content on 3rd party platforms where we have some sort of administrative role, such as our branded Facebook Page. In some circumstances, these 3rd party platforms generate many hundreds of public engagements but do not permit pre-moderation of comments. This risk would therefore be very difficult to manage.

Question 15

Do you agree that the regulations made by Scottish Ministers under these sections and which will be subject to consultation and parliamentary approval achieve the correct balance between scrutiny and the use of legislative resources?

Yes
 No

Please explain your answer.

The bill should require modifications to who may be defined as an author, editor and publisher to be made via primary legislation. This would maintain public scrutiny and transparency, while also ensuring all changes are reflected on the face of the bill.

Question 16

Should the defence of honest opinion make allowance for instances where rhetorical devices are used to express an opinion conveyed by the statement that the defender does not genuinely hold? If so, can you provide instances where such a device may have been considered defamatory?

Yes
 No

Please explain your answer.

Question 17

Do you agree that the second condition of the recast defence of honest opinion should be capable of taking into account situations where the relevant facts are likely to be known to readers?

Yes
 No

Please explain your answer.

Question 18

Should it be made clear that an offer of amends is made without admitting that a threshold test has been met?

Yes
 No

Please explain your answer.

We support any process that avoids costly court proceedings but these should not be undertaken in a manner which may be perceived as establishing a lower or inconsistent threshold for defamation. Therefore, a serious harm threshold is important to avoid defamation law being used to stifle legitimate criticism. An offer to make amends should only be deployed once it is clear a statement is actionable, as opposed to something that does not meet the same threshold.

Question 19

Should the test of whether a statement complained of is a malicious publication be strengthened, and if so, how?

Yes
 No

Please explain your answer.

Malicious publication is materially different to that of defamation. However, the test should be strengthened by including a serious harm threshold. Standardising the harm threshold across the bill will avoid potential confusion over different thresholds and further protect free expression. In any case, the threshold should be increased from “more likely than not” to ensure wealthy litigants attempting to silence critics do not abuse this power.

Question 20

Do you agree that the single publication rule is tied to the date of accrual as the date of first publication?

Yes
 No

Please explain your answer.

This is an important change to the current law which is vital for digital publishers. It will bring clarity and certainty to publishers which the law currently lacks.

Question 21

Given the previous recommendation of the Law Commission of England and Wales that 1 year is insufficient time in which to prepare litigation, and given the impact that a shorter period may have on parties' ability to utilise alternative means of resolution, should the current limitation period be retained?

Yes
 No

Please explain your answer.

If a statement is severe enough to be defamatory (and meets the serious harm threshold), it holds that a pursuer would want to seek redress straight away to stop effects of the statement being felt by them or others. To this end, it is important that both the limitation period is reduced to a year and the commencement of the period starts when the statement is published, not when the pursuer is aware of the statement. If a statement causes enough harm to require the courts to intervene, the impact should be felt as soon as the statement was published.

Question 22

If the limitation period is shortened to 1 year, do you agree that the period of limitation should be capable of being extended to reflect the period of time parties engage in alternative methods of dispute resolution?

Yes

No

Please explain your answer.

Were the limitation period to be shortened to one year, we would wish to see it recognise publishers that are regulated by a regulator recognised by the Press Recognition Panel. Where those raising defamation actions have first pursued the complaint via the independent arbitration process offered by these publishers then additional time should be provided. However, the period of limitation should require the parties to fully conclude the arbitration process, before an action can subsequently be raised.